UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JOSEPH JACKSON,	)	
	)	
	)	
v.	)	Civ. No. 03-105-B-W
	)	
STATE OF MAINE,	)	
	)	
	)	

RECOMMENDED DECISION ON 28 U.S.C. § 2254 MOTION

Petitioner Joseph Jackson, serving a thirty-year sentence for a manslaughter conviction imposed by the Maine Superior Court, Cumberland County, has filed a motion pursuant to 28 U.S.C. § 2254 seeking a writ of habeas corpus from this Court. (Docket No. 1.) Among Jackson's asserted grounds for relief is his complaint that the Maine court failed to properly apply Apprendi v. New Jersey, 530 U.S. 466 (2000) to the facts of his case and that he received ineffective assistance of counsel in the Maine courts due to a variety of factors.[1] After carefully reviewing all of the grounds raised in the petition, I now recommend that the court **DENY** the petition for the following reasons.

Background

The Maine Supreme Court sitting as the Law Court succinctly recited the factual background of this case in the following manner:

> In the early morning hours of Sunday, April 16, 1995, Juan Carlos Rodriguez was shot and killed in Lewiston. For about three weeks prior to the shooting, Rodriguez had been dealing in crack cocaine in an apartment on Knox Street. The day before the killing, Petitioner Jackson and Moore

[1] I provided Jackson with an extension of time to reply to the United States' response on the Apprendi question (Docket No. 7), however, counsel has not submitted any further pleading and my October 7, 2003, deadline has now passed.

> traded some marijuana with Rodriguez in return for a quantity of cocaine. Conflict developed among the parties when Rodriguez demanded the return of some of the cocaine because he felt he had been shortchanged. The conflict was resolved only when another person contributed some of his own cocaine to settle the dispute. Later that evening, Jackson and Moore smoked crack cocaine on at least two occasions. Nancy Dyment, who was with Jackson and Moore that night, testified that they spoke of "getting ripped off by a Dominican" and taking revenge.
>
> After midnight Jackson and Moore drove to the apartment where Rodriguez was dealing. En route they picked up two more men. They parked the car and three of the men entered the apartment building. Alfred Palmer, who occupied the apartment where Rodriguez was dealing, allowed the men inside. Sometime after entering the apartment, Jackson brandished a handgun and moved toward Rodriguez, who was in the kitchen. Moore was behind Jackson at this time. A scuffle ensued. Rodriguez lunged at Jackson with a sharp object. Jackson fired three or four shots into Rodriguez. An additional shot was fired from behind Jackson. Rodriguez died as a result of the gunshot wounds.

State v. Jackson, 1997 ME 174, ¶¶ 2-3, 1, 697 A.2d 1328, 1330; see also State v. King, 1998 ME 60, 708 A.2d 1014.

On April 19, 1995, Jackson was arrested and charged with the crime of murder in violation of 17-A M.R.S.A. § 201(1)(A). By June of that year Jackson, Moore, and Zaccheus King had been indicted by the Androscoggin Grand Jury for intentional and knowing murder. Jackson's court appointed counsel moved to sever the defendants and to change venue. The trial justice ultimately changed venue to Cumberland County and ordered the trials to be held separately, but simultaneously, in the same courthouse. After King's counsel withdrew at the last minute, his case was continued, but Jackson and Moore proceeded to trial separately, but simultaneously before two separate judges and juries. Moore was convicted of murder and Jackson was found guilty of manslaughter. On May 2, 1996, Jackson was sentenced to thirty years imprisonment.

Jackson filed both a direct appeal and an application for leave to review his sentence in accordance with the Maine Rules of Criminal Procedure. The Law Court

granted leave to appeal from the sentence and directed counsel to brief any sentencing issues as part of Jackson's direct appeal. In due course, Jackson raised the following three issues on appeal:

1. The sentencing court committed error under state law by sentencing him to a sentence in the upper range of sentences for Class A crimes, namely in excess of the so-called "first tier" sentencing range of up to twenty years.

2. The trial court erred in allowing a witness to testify about a discussion over a plan to rob a crack dealer that occurred two and one-half weeks prior to the crime, in violation of Maine Rules of Evidence 404(b).

3. The trial court also erred by allowing the testimony of a witness who had supposedly violated a sequestration order.

The Law Court rejected each of these claims in a decision issued on July 31, 1997. Id. at 1328.

On December 8, 1997, Jackson filed a pro se state petition for post-conviction review. He raised a number of claims, including eleven ineffective assistance of counsel claims and a claim that the sentencing judge was biased against him based upon his race. Jackson received court appointed counsel and filed an amended petition. Ultimately, after a number of procedural delays, the post-conviction review evidentiary hearing was held on November 28, 2001. Pending before the court at that time were three claims of ineffective assistance of counsel and a fourth claim that alleged that the thirty-year sentence was illegal under Apprendi v. New Jersey, 530 U.S. 466 (2000). In a written order dated August 8, 2002, the assigned justice determined that Apprendi should not be applied retroactively to Jackson's case and that the ineffective assistance claims were

"without merit." As required by Maine procedural rules, Jackson then attempted to appeal the decision of the post-conviction court by obtaining a Certificate of Probable Cause from the Law Court. On October 15, 2002, the Law Court denied his request, thus effectively terminating Jackson's case in the state courts.

On June 12, 2003, Jackson filed this admittedly timely petition seeking habeas corpus relief pursuant to 28 U.S.C. § 2254. In his petition, Jackson raises three grounds that I characterize as follows:

1. First, Jackson argues that his sentence lacks proportionality when compared with the sentences imposed on others. To the extent this is a constitutional claim, I would surmise that it arises under the Eighth Amendment's bar against cruel and unusual punishment, although Jackson cites Apprendi in support of this ground as well as in his third claim.

2. Ground Two is incomprehensible and contains absolutely no supporting facts.

3. Jackson's third ground is a straight up claim challenging under Apprendi the Maine court's decision, and asserting that the court incorrectly applied the principles of retroactivity in violation of the Constitution.

4. The final claim raised by Jackson is a catchall ineffective assistance claim. I read this claim to state that the three grounds raised in this petition and the three claims previously asserted in petitioner's state post-conviction petition, amounting to six claims of ineffective assistance, are all being simultaneously reasserted in this pleading.

Discussion

1. Fully Exhausted Constitutional Claims

Jackson's claim that his thirty-year sentence violates the principles of Apprendi was fully litigated in the state courts and reappears in Grounds One and Three of this petition. Although the default statutory maximum sentence for manslaughter under 17-A M.R.S.A. § 203 is forty years, Maine's sentencing provisions, decisional and statutory, create a two-tier sentencing paradigm wherein a Class A Crime can only carry a sentence in excess of twenty years if certain enhancing factors are present. Under this provision the sentencing court considers "the nature and seriousness of the crime alone or on the nature and seriousness of the crime coupled with the serious criminal history of the defendant." See 17-A M.R.S.A. § 1252(2)(A); State v. Carr, 1998 ME 237, ¶ 5, 712 A.2d 504, 533. Although the Maine Law Court has determined that Apprendi principles[2] are applicable to the enhanced sentencing provisions of Maine's attempted murder statute, 17-A M.R.S.A. § 152 (4)(F), State v. Burdick, 2001 ME 143, 782 A.2d 319, it has not considered the application of Apprendi to the sentencing scheme set forth under § 1252.

Apparently assuming that Apprendi issues lurked within the two-tier Class A Crime sentencing scheme, the state post-conviction justice determined that under the analysis required by Teague v. Lane, 489 U.S. 288 (1989), Apprendi, a case decided approximately three years after Jackson's conviction became final, should not be applied retroactively to his case. Jackson v. State of Maine, Cr-97-1936, slip. op. at 3-5 (Super.

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[2] Apprendi held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." 530 U.S. at 490.

Ct. Aug. 8, 2002). Jackson sought to appeal that decision, and the Maine Law Court denied a Certificate of Probable Cause determining that "the appeal does not raise any issue likely to succeed or otherwise worthy of a full hearing." Jackson v. State of Maine, Cum. 02-528 (Sup. Jud. Ct. Oct. 15, 2002).

These two decisions by Maine's courts cannot be said to be "contrary to, [n]or involve[d] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The United States Supreme Court has not yet determined whether Apprendi should be applied retroactively, but since the time that Jackson's state post-conviction was decided, the First Circuit has held "without serious question, that Apprendi prescribes a new rule of criminal procedure, and that Teague does not permit inferior federal courts to apply the Apprendi rule retroactively to cases on collateral review." Sepulveda v. United States, 330 F.3d 55, 63 (1st Cir. 2003). All of the ten other Courts of Appeal are also following this path. United States v. Swinton, 333 F.3d 481 (3d Cir. 2003); Goode v. United States, 305 F.3d 378 (6th Cir. 2002); Coleman v. United States, 329 F.3d 77 (2d Cir. 2003); United States v. Brown, 305 F.3d 304 (5th Cir. 2002); Curtis v. United States, 294 F.3d 841 (7th Cir. 2002); United States v. Mora, 293 F.3d 1213, 1219 (10th Cir. 2002); United States v. Sanchez-Cervantes, 282 F.3d 664, 665 (9th Cir. 2002); McCoy v. United States, 266 F.3d 1245 (11th Cir. 2001); United States v. Moss, 252 F.3d 993 (8th Cir. 2001); United States v. Sanders, 247 F.3d 139, 146-51 (4th Cir. 2001). In view of such uniformity amongst the federal Courts of Appeal, it cannot be argued that the Superior Court's Teague analysis was "contrary to, or involved an unreasonable application" of Apprendi through the Teague prism.

2. Claims That Are Not Cognizable Constitutional Claims in this Court

In his first ground Jackson appears to argue that the sentence imposed in this case was excessive and resulted in a grave disparity between the sentence he received and other sentences received by similarly situated individuals. That argument was raised in Jackson's direct appeal, but it was not raised as a federal constitutional claim. Indeed, during his direct appeal Jackson relied upon State v. Hewey, 622 A.2d 1151, 1155 (Me. 1993) and its progeny in support of the argument that his sentence resulted in a "misapplication of principle in determining the basic sentence." (Appellant Br. at 11.) Because Jackson has never postured this issue as one with federal constitutional dimension, either in the state courts or even in his current petition, it most assuredly should not be reviewed in the first instance by this court. See Barresi v. Maloney, 296 F.3d 48, 51-52 (1st Cir. 2002); see also Hammer v. Karlen, 342 F.3d 807, 809 n.1 (7th Cir. 2003). Even if this claim were somehow viable in this forum, the sentence imposed for the crime was clearly not excessive under federal law as set forth by the United States Supreme Court in Lockyer v. Andrade, __U.S.__, 123 S.Ct. 1166 (2003) (upholding life sentence for state prisoner convicted on two counts of petty theft under California's Career Criminal Punishment Act, also known as the Three Strikes law).

Ground Four of Jackson's petition is a catchall claim of ineffective assistance of counsel. He appears by this ground to be incorporating the three claims of ineffective assistance he raised in the state post-conviction proceeding. It is the State's contention as to these three claims that Jackson has not properly exhausted his available state court remedies because in his Memorandum in support of his request for a Certificate of Probable Cause, Jackson only raised the single Apprendi issue. The state post-conviction

justice summarily dealt with Jackson's claims of ineffective assistance with the following observation:

> Finally, with regard to Petitioner's claims for post-conviction relief alleging ineffective assistance of counsel, the Court conducted a hearing on November 28, 2001. The Court finds that each of Petitioner's claims are without merit, and holds that Petitioner did, in fact, receive effective assistance at trial.

Jackson v. State of Maine, Cr-97-1936, slip. op. at 5 (Super. Ct. Aug. 8, 2002). The Maine Law Court was never asked to review those findings, and thus Jackson failed to fully exhaust his available state court remedies. "Barring certain exceptional circumstances not present here, a habeas petitioner in state custody may not advance his or her constitutional claims in a federal forum unless and until the substance of those claims has been fairly presented to the state's highest court." Barresi, 296 F.3d at 51 (emphasizing the need to preserve federal-state comity).

3. Ground Two of the Petition

Ground Two of Jackson's petition, in it entirety, is:

> Maine Court's failed to recognize abuse of discretion in their structural error, allow bias testimony.
>
> Based on impeachment purposes, Lawcourt wrongfully applied standard of review within constitutional magnitude of vital impeachment practices prosecutors use within M.R.of Evidence Rule 404 – 406. A structural error that should have been construed highly prejudicial and a reversal of conviction based upon Strickland and Cronic ineffective assistance claims.

(Sec. 2255 Pet. at 5.)

The State interprets this ground as raising a claim that the Law Court incorrectly upheld the admissibility of the testimony of Geoffrey Motil, who testified at trial that two and one-half weeks before the killing, Motil and Jackson, along with Jeremiah Moore and

a fourth person, staked out a house in Lewiston where crack cocaine was being sold.[3] According to Motil the purpose of the stakeout was in furtherance of a plan to rob a Dominican crack dealer named Carlos, one of the names used by the deceased. The Law Court rejected the various challenges raised by Jackson's counsel under the Maine Rules of Evidence and ruled that this testimony was properly admitted. State v. Jackson, 697 A.2d at 1330.

The Law Court reasoned:

> Jackson argues that Motil's testimony was character evidence inadmissible pursuant to M. R. Evid. 404(b). We disagree. Evidence of prior bad acts is not admissible to prove that a person acted on a particular occasion in conformity with his past behavior. Such evidence may be admissible, however, when offered for another purpose such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. See M. R. Evid. 404 advisers' note. Motil's testimony was admissible because it tended to establish that Jackson planned to rob Rodriguez when he entered the apartment on Knox Street, thus showing Jackson's intent at the time of the killing. Consequently, the testimony had a legitimate purpose rather than the illegitimate suggestion that Jackson had a propensity to commit crimes.

Id. at 1331 (footnote omitted). This analysis is a reasonable evidentiary analysis and the admission of this testimony certainly not the type of evidentiary rule that gives rise to a § 2254 claim of constitutional error. See United States v. Barrett, 539 F.2d 224, 253 (1st Cir. 1976).

Conclusion

For these reasons I recommend that the Court **DENY** Jackson's 28 U.S.C. § 2254 motion.

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[3] I was tempted to decline the State's invitation to engage in any such speculation. Jackson has provided no factual clues to what evidentiary ruling he is challenging. This allegation arguably falls outside the bounds of a reasonable framing of the tenable issues raised by this pro se petition. See Barrett v. United States, 965 F.2d 1184, 1186 (1st Cir. 1992) (observing that § 2255 ground is subject to dismissal if the claim is nothing but "mere 'bald' assertions without sufficiently particular and supportive allegations of fact").

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

October 21, 2003.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

U.S. District Court
District of Maine (Bangor)
CIVIL DOCKET FOR CASE #: 1:03-cv-00105-JAW
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JACKSON v. WARDEN, MAINE STATE PRISON
Assigned to: JUDGE JOHN A. WOODCOCK JR
Referred to: MAG. JUDGE MARGARET J. KRAVCHUK
Demand: $
Lead Docket: None
Related Cases: None
Case in other court: None
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

Date Filed: 06/12/03
Jury Demand: None
Nature of Suit: 530 Habeas Corpus (General)
Jurisdiction: Federal Question

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